

National Association of Public Pension Attorneys
Legal Education Conference
February 8-9, 2012 – Washington DC

Investment

- The Evolution of Private Equity and Hedge Fund LP Agreements and Side Letters – panelists reviewed Delaware fiduciary duties of care and loyalty, implied contractual covenant of good faith and fair dealing and the evolution of side letters. Addressed increase in use of provisions attempting to limit or circumvent parties' fiduciary duties.

Fiduciary and Plan Governance

- Comments from the Hill – Michael Kreps (Pensions Counsel on the Senate Committee on Health, Education, Labor and Pensions) noted that Senator Harkin strongly supports DB plans and believes this area should be left to the states to govern. Andrew Banducci (House staff member) anticipates a push for more investment-based legislation to increase transparency in fee disclosure. Both anticipate little new legislation will be addressed until after the election.
- The Role of Public Pension Plan Boards and Staff in Plan Modifications – speakers summarized the spectrum of staff and board participation inviting audience input and concluding these roles vary depending on circumstances from a more passive neutral administrator role to one of a more aggressive advocate or activist.
- Fiduciary Duty in Volatile Markets – panelists addressed public plans adopting a prudent expert vs. prudent person standard, including a continuing duty to monitor in investment manager contracts and one plan's experience conducting post-closing operational due diligence with on site visits.

Benefits

- USERRA – Nora Carroll (Senior Attorney from Department of Labor Office of the Solicitor) explained key provisions of USERRA including its application to all employers, time limits for covered absences, returning to work and other eligibility requirements. Notably, there is no minimum time for reemployment; as long as an individual is in pay status for a day, and they are otherwise eligible, they may take advantage of USERRA.
- Electronic Evidence / Administrative Hearings – Presenter was ill and unable to attend. Volunteer speakers discussed their plans' recent experience using social media to investigate conduct of disability applicants and potential fraud.
- Pension Fund Litigation Update - summary of 2011 cases highlighting statute of limitation, eligibility, service credit, salary and benefit computation, disability determinations and requests for information. Attorney from Maryland also reviewed the outcome of their recent case against

Milliman for breach of contract following 130M underrepresentation of liabilities due to actuary's failure to consider survivorship beneficiaries in three member retirement systems.

Tax

- Federal Legislative Update – Hank Kim (National Conference on Public Employee Retirement Systems) outlined national polling results indicating a positive reception for the concept of DB plans returning to the private sector. The concept is geared toward small businesses (<50 people) and based on a hybrid plan funded by career accumulation cash balances. A white paper titled “Secure Choice Pension” detailing the plan is available at retirementsecurityforall.org
- Current Developments
 - a. Pickup Contributions – panelists debated merits of proposal to change federal law (IRC § 414(h)(2)) allowing employees to elect between cash and deferred compensation. While plan would increase present wages it would perpetuate retirement instability and have little immediate impact on UALs.
 - b. Determination of Governmental Plan Status – panelists reviewed the definitions and potential impact of the provisions in the Advanced Notice of Proposed Rulemaking (ANPRM) and noted the comment period has been extended to June 2012 with a hearing scheduled for July.
- IRS Update - IRS staff explained the 6 year history behind the Governmental Plan Status project with joint participation from the IRS, DoL, Treasury and the PBGC. Their goal in using an advanced notice was to increase the time frame to change the rules thereby increasing the number and quality of comments submitted. Approximately 50 comments have been received; the IRS requests any further comments include concrete examples and propose requested transition relief.